

IN THE INCOME TAX APPELLATE TRIBUNAL 'SMC' BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM

ITA No. 646/MUM/2022

(Assessment Year 2011-12)

M/s, Bhairav Tube (INDIA)
Shop No. 10, Ground Floor,
6TH Khotwadi Lane,
Mumbai-400 004

Vs.

ITO WD19(1)(2)
Aaykar Bhavan,
Mumbai- 400 021

(Appellant)

(Respondent)

PAN No.AAWFT1198E

Assessee by : None
Revenue by : Shri. Ujjwal Chavan SR AR

Date of hearing: 19.09.2022
Date of pronouncement: 31.10.2022

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by the assessee against Appellate order passed by The Commissioner Of Income Tax (Appeals) – 6, Mumbai [The Ld. CIT (A)] dated 5/8/2019 for assessment year 2011 – 12 wherein appeal filed by the assessee against the assessment order passed u/s 143 (3) read with Section 147 of The Income Tax Act, 1961 [The Act] dated 19/10/2016 passed by The Income Tax Officer, Ward 19 (1) (2), Mumbai (The AO) is dismissed.
02. Briefly stated the learned assessing officer reopened the assessment for the impugned assessment year and made an addition of ₹ 1,722,871/- being 12.5% of Rs 1, 37,82,968/- being bogus purchases from 14 different parties which is confirmed by the learned CIT – A



therefore assessee is in appeal before us raising following grounds of appeal: -

"1. Delay in filling of this appeal may be condone as per an application with prayer to condone the delay, and an Affidavit executed by partner of the firm in support of an application with prayer to condone the delay considering the facts and circumstances of the case and highly oblige. It may be noted that Learned CIT(A)-A, Mumbai should have served the appeal order by electronic mode on mail address of the Appellant and of C.A. which are available on record with the authorities. Even an appeal in Form-35 was submitted by e-filing, hence CIT(A) ought to have mail address of the appellant.

2. Assessing Officer has initialed reassessment proceedings as per information provided by DGIT (Inv.), Mumbai based on information supplied by Sales Tax Department of Maharashtra State in respect of various parties issuing bogus sale/purchase bills without supplying of goods to parties and the Appellant is one of the parties who has effected purchases from such 14 parties but Assessing Officer has not independently subjected the information for further verification and without application of his own mind without satisfaction of his own that Appellant has either inflated Purchases or inflated purchase price, mechanically relying on the information's recorded the reasons which are not based on tangible materials or cogent facts which should have direct reduce and live link to his reason to believe,



therefore, Assessing Officer has not initiated reassessment. proceedings as per the norms laid down by Jurisdictional Bombay High Court and other High Court and Apex Court of India, therefore, reasons recorded by Assessing Officer may be declared invalid and void and notice issued u/s. 148 of the Act may be quashed. This ground was not decided by CIT(A), Mumbai properly and as per law. Further Assessing Officer failed to mentioned the date of reason recorded by him nor he has provided copy of the same to the Appellant as per written request made to him vide letter dated 17-02-2016 the Respondent may be directed to produce original assessment record in which original copy of reason recorded would be available with proceeding sheet to prove that reasons are recorded before issuing notice u/s. 148 of the set, failings which an adverse inference may be drawn against the Assessing Officer for withholding the record as per section 114(g) of the Indian evidence Act and to quash the notice issued u/s 148 of the Act with direction to annulled and/or set aside the re-opening proceeding with reassessment order dated 19-10-2016 and to delete the addition made by Assessing Officer and sustained by CIT(A), Mumbai

3. Appellant has submitted letter dated 17-02-2016 in response to the notice issued u/s. 148 of the Act and requested Assessing Officer to consider the original return of income submitted on 25-09-2011 may be considered in response and in compliance or police u/s. 148 and further requested Assessing Officer to



furnish copy of reasons recorded for raising objections but he failed to provide the same. This conduct of Assessing Officer could render the order of reassessment invalid as reassessment compelled by the Assessing Officer u/s. 147 of the Act cannot be sustained. This is well settled law as per the decisions of jurisdictional Bombay High Court I.T.A.T., Mumbai and Apex Court of India. Therefore, it is prayed that the order passed by Assessing Officer dated 19-10-2016 may be annulled and/or set side in toto with direction to delete the addition made by Assessing Officer and substantiated by CIT(A), Mumbai. It is pertinent to note that CIT(A) neglected to decide this is issue while passions appeal order though raised specifically by A.R. in his letter dated 17-07-2019 submitted to CIT(A) and he has referred the same in his order but failed to decide the issue by giving step motherly treatment to the appellant.

4. Materials, documents, information's, investigation report, affirmations, depositions, statements, affidavits etc. given by 14 parties are not available on the assessment record of Assessing Officer and if at all available on record have not been provided to the Appellant but used against the Appellant for initiation of reassessment proceedings, and for making additions, this conduct on the part of Assessing Officer would render this order being in violation of risks of natural justice and for the reasons the order passed by Assessing Officer may not be sustained and may be annulled and/or set aside with direction to delete the additions made by him and sustained by



CIT(A) without deciding this order grand raised before the authorities.

5. It is well settled law that when authority is relying on the statement of entry providers they are the approvals/witnesses of the department shah incriminating materials and evidences must be provided to the assessee for repulate with opportunity to cross examine of entry provider by assessee failing which additionally cannot be sustained.

6. Appellant has provided the materials, documents, evidences i.e. Tax Invoices and challans issued by 14 parties which bear the TIN numbers, PAN numbers and Certificates that their TIN number are valid and in force on the day of sales effected to the Appellant, identification statement of sales effected again the purchases effected from 14 parties, their ledger accounts copies showing payments made to then by 'Payees A/c Cheese only and Bank Statements in support of the payments. Thus Appellant has discharged has initial burden by providing all the materials in respect of purchases effected from 14 parties whereas Assessing Officer failed to bring on record any Concrete, Cogent, corroborative and incriminating materials on record to discard the details submitted to him, but merely relying on the information's of other parties made additions based merely on suspicion considered and surmises, assumptions and presumptions and with berated mind which may not be allowed to prevail in the case of the Appellant. Assessing Officer as well as CIT(A)

have not decided these issues properly and legally as they neglected to follow the decisions of the jurisdiction Bombay High Court, ITAT Mumbai and Supreme Court of India but followed the judgment of Gujarat High Court, which is against the principles of Article 141 of the Constitution of India. Therefore, addition made by Assessing Officer sustained by CIT(A) may be deleted or may be reduced to token percentage in the interest of justice.

7. Interest levied u/s 234 B of the Act for short payment of advance tax and interest levied u/s. 234C for nonpayment of assessed tax may be deleted as appellant is pursuing all legal remedies and which was not finally accepted by the Appellant after five years of completion of Financial year and the fact of finality of the appeal is yet to be decided by this Honorable ITAT, Mumbai."

03. Facts shows that assessee is a firm engaged in the business of trading in ferrous and nonferrous metals. It filed its return of income on 25/9/2011 at a total income of ₹ 164,070/-. This return was not picked up for scrutiny and therefore subsequently when information was received from the sales tax Department and DGIT (investigation), Mumbai that some businessmen has indulged in acceptance of bogus purchase bill from the bogus hawala bill providers. As per the information received the name of the assessee also appeared as one of the beneficiaries of such bogus purchase bills during the previous year relevant to assessment year consideration.



Therefore, the income to the extent of the purchase from such parties escaped assessment within the meaning of Section 147 of the act and accordingly notices were issued u/s 148 of the act after recording the reasons for reopening of the assessment. The AO issued notice u/s 148 on 4/2/2016 wherein response thereto the assessee filed at requesting to treat the return filed on 25/9/2011 as return in response to notice for reopening of the assessment. Consequently, the assessment order was passed u/s 143 (3) with Section 147 of the act on 19/10/2016 determining the total income at ₹ 1,886,940/- wherein the learned assessing officer has made an addition of ₹ 1,722,871/- being 12.5% of the nongenuine purchases of ₹ 13,782,968 from 14 bogus parties purchases from which could not be substantiated by the assessee. Assessee also expressed its inability to produce the parties for verification as those are not available at the address, however assessee provided the explanation along with the other documentary evidence like copies of purchase bills etc. The learned assessing officer rejected the contention of the assessee as assessee has failed to discharge its primary onus of proving genuineness of the purchases, he disallowed 12.5% of those purchases as embedded profit in the same. Accordingly, the assessment was made u/s 147 rws 143(3) of The Act determining total income at Rs. 1886940/-.

04. Aggrieved by assessment order, appeal was preferred before appellate authority. The reassessment proceedings



were challenged as per ground number 1, relying on the decision of the Honourable Supreme Court in 291 ITR 500, same was upheld. On the merits the addition was confirmed.

05. Aggrieved with the appellate order appeal was preferred before us on the first date of hearing on 19 July 2022 none appeared and further when matter was adjourned to 19 September 2022 nonappearance continued. Therefore, the appeal is decided on the merits of the case as per information available on record.
06. It is found that appeal is delayed for the reason that appellate order is dated 6/8/2019, the assessee says that same was communicated to on 5/3/2022 and subsequently on 11/4/2022 the appeal was filed. For the condonation of delay, assessee submitted that there was change in the address of the reason that the form was having address which went into the development of the building and therefore the address of the assessee was shifted therefore the appellate order could not be served on the assessee. Subsequently when penalty order u/s 271 (1) © was received assessee came to know about the impugned order as in the appellate order it was mentioned that appeal filed by the assessee before the first appellate authority was dismissed. This happened on 2/2/2022. Thereafter assessee immediately filed the appeal. In the process it caused delay in filing of this appeal. Same is also supported by affidavit of the partner of the firm. The facts also shows that the appellate order shows the

address of the assessee different from form number 36 filed before us. In view of this we find that there is a sufficient cause for delay in filing of the appeal and hence same is condoned.

07. Before the learned CIT – A despite notices, none attended the hearing on the appointed date on several occasions and subsequently a paper book along with submission was sent to the CIT – A through speed post by the representative of the assessee to consider it and pass an order. Therefore, CIT – A passed an order on the basis of the written submission and paper book filed by the assessee.
08. It is surprising to note that assessee has filed the appeal before the lower authorities however did not think fit to remain present before them. Even before us assessee does not want to represent him as he is consistently avoiding the notices.
09. The learned departmental representative vehemently supported the orders of the lower authorities and submitted that the reopening has been validly initiated further the addition made at the rate of 12.5% is also supported by the order of the Honourable Bombay High Court. In view of this, there is no infirmity in the orders of the lower authorities.
010. We have carefully considered the rival contention and perused the orders of the lower authorities. The assessee is a partnership firm engaged in the business of trading of

ferrous as well as nonferrous metals. Original return filed was not picked up for scrutiny. Subsequently when the information was received about assessee engaging in purchase from 14 parties who are listed as bogus parties, the case of the assessee was reopened. We find that there is a tangible material available with the assessing officer for reopening of the material and it is rightly upheld by the learned CIT - A. He relied on the decision of the Honourable Bombay High Court in case of principal Commissioner of income tax versus Batliboi environmental engineering Ltd wherein 12.5% of the bogus purchases were held to be reasonable.

011. On the merits of the addition, we find that issue squarely covered by the decision of the Honourable Bombay High Court in **Principal Commissioner of Income-tax V Batliboi Environmental Engineering Ltd.*2022] 141 taxmann.com 245 (Bombay)** wherein 12.5% of the amount of the bogus purchases were appellant is an addition in such cases. The Honourable High Court held as Under: -

“4. As regards first question, the Tribunal has upheld the finding and conclusion of the Commissioner of Income-tax (Appeals) whereby the Commissioner (Appeals) directed the Assessing Officer to disallow 12.5% **boguspurchases** and to add 12.5% of the amount of **purchases** as income of the Appellant. The argument advanced is that the **bogus purchases** ought to have been disallowed in totality. The learned counsel for the



parties have placed before us the decisions of the Division Bench in the cases of *Pr. CIT v. Mohammad Haji Adam & Co.* [2019] 103 taxmann.com 459 (Bom.) and *Pr. CIT v. Paramshakti Distributors (P.) Ltd.* [IT Appeal No. 413 of 2017, dated 15-7-2010] wherein the Division Bench has observed that if the factum of sales has been accepted by the Department then even if it is established that there were **bogus purchase**, it is not necessary that entire amount should be added to the income of the Assessee as there cannot be a sale without **purchase**. The facts of the present case are identical wherein the sales have been accepted. Therefore, considering the aforesaid decisions first question of law does not survive for consideration."

012. In view of this, the appeal filed by the assessee is dismissed.

Order pronounced in the open court on 31.10.2022.

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 31.10.2022

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A)



4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai